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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No.

GENERAL MOTORS CORPORATION,
Petitioner,

v.

BETTY OSWALD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petitioner General Motors Corporation respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 26, 1979.

OPINIONS BELOW

The opinion of the district court is unreported. It appears in the appendix at pages 4a-22a. The opinion of the court of appeals is reported at 594 F.2d 1106 (1979). It appears in the appendix at pages 23a-85a. The judgment of the court of appeals denying rehearing is unreported. It appears in the appendix at pages 86a-87a.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1979. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on May 4, 1979. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. With respect to the standards for reviewing class action settlements under Rule 23(e), Fed. R. Civ. P.:

   a. May a proposed class action settlement be approved only if it is demonstrated to be fair and reasonable by "clear and convincing evidence"?

   b. Is it reversible error for a district court to deny objectors to a class action settlement discovery into the subjective mental processes of the settlement negotiators when the extensive evidentiary record supports the district court's finding that the settlement is fair and reasonable?

2. With respect to the form of class action settlements under Rule 23(e), Fed. R. Civ. P., is it improper for a court approved class action settlement to resolve and compromise the claims of all class members who previously elected to be bound by the class action, even though some of the class members may be dissatisfied with the settlement?

STATUTE INVOLVED

Fed. R. Civ. P. 23(c)(2):

In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Fed. R. Civ. P. 23(e):

Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

Commencing in March, 1977, over 300 lawsuits were filed against General Motors claiming that its interdivisional usage of engines and other power train components in 1977 Buicks, Pontiacs and Oldsmobiles was unlawful. Most of these cases were filed in state courts. This litigation included a total of 41 purported class actions, many individual private actions and 33 actions brought by state attorneys general to protect their consumers. Although the legal theories of this multitude of cases were varied, the factual allegations and claims for relief were essentially the same in all of them. As a result, many consumers purportedly were having essentially the same claim asserted on their behalf as putative class members and consumers in different forums simultaneously.

Of the over 300 lawsuits, 12 were individual or purported class actions in federal court brought by or on behalf of 1977 Oldsmobile purchasers. These actions alleged that the use in 1977 Oldsmobiles of V-8 engines produced in General Motors plants operated by its Chevrolet Motor Division constituted a violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* Federal court jurisdiction was predicated on 28 U.S.C. § 1331, and the 12 cases were consolidated in the Northern District of Illinois for pretrial purposes pursuant to 28 U.S.C. § 1407. Included within the consolidated cases were two actions brought by the Alabama Attorney General and the Illinois Attorney General, who filed the first Magnuson-Moss action. Over General Motors' objections, the district court on October 13, 1977, certified a nationwide class in those cases solely for the purpose of determining Magnuson-Moss liability, but not damages, with respect to the usage of Chevrolet-produced V-8 engines in 1977 Oldsmobiles. This petition arises out of that consolidated litigation.

In the fall of 1977, the many attorneys general who had filed or were threatening litigation undertook negotiations with General Motors for the possible settlement of their litigation on behalf of consumers. On December 19, 1977, General Motors and the attorneys general of 44 states[1] announced a settlement agreement whereby each person who purchased prior to April 11, 1977,[2] a new 1977 Buick, Pontiac or Oldsmobile equipped with a Chevrolet-produced V-8 engine would be offered $200 and, if eligible, a transferable three-year mechanical insurance certificate covering the engine and other power train com-

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[1] Since that time the attorneys general of four additional states have consented to the settlement terms for their consumers.

[2] This date was chosen because the extensive publicity given to this litigation and notices placed in dealer showrooms by General Motors regarding engine sources beginning in March, 1977 placed pre-April 11th purchasers in a significantly different factual posture than other purchasers.

ponents in their 1977 General Motors car. In return for this consideration, each person accepting the offer was to release his claims relating to substitution of components in his 1977 General Motors car. The release specifically did not bar any claims for defects in any components.

The agreement with the attorneys general required the offer to be communicated as soon as practicable, subject to obtaining court permission in those jurisdictions where class actions were pending and where local rules required court approval of communications with class members. The agreement was submitted for approval in all such instances. Approvals were obtained from 12 state courts for the communication of the offer to eligible Buick and Pontiac purchasers. The offer was communicated to those purchasers, and more than 90% of those who have received the offer have now accepted it.

Because of the pending federal class action, it was necessary to obtain district court approval of any communication of the offer to eligible Oldsmobile purchasers who were class members. Local Rule 22, N.D. Ill. Accordingly, on December 19, 1977, the attorneys general and General Motors submitted the offer to the district court for approval of its communication to eligible purchasers. They further proposed that the offer be considered as a basis for settling and dismissing the Magnuson-Moss claims of all eligible class members. Private counsel in the federal litigation endorsed the view that this offer might provide a suitable basis for terminating the federal class litigation of eligible class members.[3] They requested and re-

[3] In the federal litigation, 66,872 class members were eligible for the offer agreed to with the attorneys general. Each accepting class member would receive $200.00 cash, an amount greater than the suggested retail price for the 350 V-8 engine option in his car, and if eligible, an insurance certificate with an estimated retail premium value of $200.00. Thus the agreement with the attorneys general included consideration valued at over 26 million dollars for the settlement of the claims of those eligible consumers who were also members of the federal class.

ceived a period for discovery into the merits of the offer so that they could consider that possibility further.

To facilitate private plaintiff counsel's evaluation of the offer as a basis for settlement, extensive discovery into the fairness of the settlement was conducted by them. The court required that all factual materials and documents regarding the 1977 Oldsmobiles which had been made available to the attorneys general be produced to the private plaintiffs. Discovery by private plaintiffs into the settlement's adequacy included depositions of: (a) General Motors' engineering expert on the comparability of the V-8 engines used in 1977 Oldsmobiles; (b) an assistant comptroller of the General Motors Parts Division who was familiar with the replacement parts prices for the relevant engines and their components; and (c) the marketing vice-president of the General Motors subsidiary, Motors Insurance Corporation (MIC), which was issuing the mechanical insurance policy which was part of the consideration for the proffered settlement, and who was an expert on its value in the marketplace. General Motors also answered numerous interrogatories, and satisfied additional document requests.

Following this discovery, all plaintiffs' counsel concurred that the offer provided a promising basis for the settlement of eligible class members' claims. All plaintiffs' counsel endorsed notifying class members of the proposed settlement and scheduling a hearing on its fairness. On March 16, 1978, the district court sent class members a notice informing them that a class had been certified and advising them of their right to opt-out of the class and thereby avoid the binding impact of any further proceedings in the litigation. The notice also informed class members that a settlement had been proposed, that a hearing on its fairness was scheduled and that if they remained in the litigation they could appear at the hearing and object to the settlement. No objections to the offer as a basis for settlement

were expressed by plaintiffs' counsel prior to notifying class members of it.

Of the 66,872 class members to whom the settlement offer was directed only 15 came forward to object to it. After a 12-day fairness hearing, during which extensive evidence was received by the district court, that court found the settlement to be a fair and reasonable basis for settling the claims of pre-April 11, 1977 Oldsmobile purchasers who were in the class and eligible to receive the offer. In approving the settlement, the district court issued written findings of fact and conclusions of law which expressly found that the evidence regarding the comparability of the engines in question persuaded it that "the settlement falls well within the parameters of reasonableness and fairness." Appendix at p. 13a. It also stated that it was assured that "no prejudice has resulted to the subclass members by reason of the manner in which the settlement was negotiated." Appendix at p. 16a.

The plaintiff-objectors appealed the finding of fairness and reasonableness to the Seventh Circuit Court of Appeals, which accepted the appeal under the collateral order doctrine. The court of appeals reversed the district court's approval of the settlement on two grounds. *First*, after reviewing the settlement hearing record, the court concluded that the district court abused its discretion in approving the settlement because (a) the fairness of the settlement was not established by "clear and convincing evidence," and (b) the district court did not allow discovery into the mental processes of the settlement negotiators.[4] *Second*, the court of appeals struck down the proposed settlement because it required the dismissal with prejudice of

[4] *See* Memorandum Opinion of the district court dated February 8, 1978 in the appendix at p. 1a.

the federal claims of all eligible persons who had elected to be bound by the class action, including those who thereafter were dissatisfied with the settlement.

The court of appeals issued directions on remand which permitted the offer to be extended, provided that those class members who choose not to accept the settlement offer were permitted to continue to participate in the federal class litigation, and provided further that the district court approved a neutral notice adequately describing the offer and its effect on class members' claims. A final form of the notice of offer was approved by the district court on July 27, 1979, and that notice has been mailed to eligible Oldsmobile purchasers.[5]

REASONS FOR GRANTING THE WRIT

The volume and complexity of litigation is currently taxing our judicial system to its limits. Despite this burden and notwithstanding the strong policy favoring settlements, the court of appeals upset a thoroughly scrutinized settlement of claims which were enmeshed in a morass of complicated and interrelated litigation. In reversing the district court's approval of the settlement, the court of appeals created an impediment to settlement not just in this litigation, but in class action litigation throughout the country. Its erroneous opinion is now being cited by objectors to class settlements as a leading precedent on standards to be applied in approving or disapproving of those settlements.

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[5] General Motors is filing this petition because a reversal of the court of appeals on the grounds cited herein would permit resubmission of the offer of settlement to class members who do not accept General Motors' offer approved by the district court on July 27, with the proviso that they be bound by its terms. Thus the issues raised by this petition are not moot.

In its decision, the court of appeals improperly interposed its own discretion for that of the district court in settlement matters. It unilaterally set an unduly rigorous standard for evaluating a settlement's fairness—"clear and convincing evidence"—which should not be applied to a Rule 23(e) settlement. It considered the denial of discovery into the mental processes of the settlement negotiators to be reversible error—an ominous holding with a potentially negative impact on the willingness of litigants to enter into settlement discussions in any case and particularly in this case where the district court found the objective facts concerning the settlement confirmed its fairness. The court's decision also undermined a major purpose of Rule 23 class actions—final, classwide resolution of claims either through adjudication or a court approved settlement—by holding that persons electing to stay in a class should still not be bound by a settlement which they find personally unsatisfactory.

The court of appeals' decision is in conflict with decisions of other courts of appeals and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision. This case affords the Court an opportunity to clarify the procedures and standards surrounding the judicial approval of class action settlements, a subject of increasing importance as federal class actions proliferate and their management by lower federal courts becomes more numerous.

I. In Conflict With Other Circuits, The Court of Appeals Improperly Invaded the Province of the District Court By Applying the Wrong Legal Standards to Its Review of the District Court's Approval of a Class Settlement.

In ruling on the conduct of the settlement negotiations, the court of appeals applied improper legal standards. In the first place, it held *the district court* to an improperly high standard of proof in *its* approval of a class settlement. The court of appeals

held that the district court should have used the unprecedented standard of "clear and convincing evidence." Appendix at p. 52a, n. 30.

Second, the court of appeals applied the wrong standard to *its* review of the district court's fairness determination. Many courts of appeals have held that the proper standard of review for them to apply in passing on the approval of a class settlement by a district court is abuse of discretion. *See, e.g., Cotton* v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied* 404 U.S. 871 (1972). In *City of Detroit* v. *Grinnell, supra*, the court stated that "so much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion." 495 F.2d at 455.

While the court of appeals articulated this standard in its opinion, instead of reviewing for an abuse of discretion, it invaded the province of the district court and erroneously applied the test of "clear and convincing evidence" in reviewing the record created in the district court. The court of appeals' application of this standard is unsupported by precedent and in conflict with the decisions of other courts of appeals.

The abuse of discretion standard necessarily contemplates that the district court be responsible for examining a proposed class settlement, and, as appropriate, the circumstances surrounding it, and exercise its discretion to approve the settlement as fair, or not. This role is appropriate for the district court judge, who is intimately familiar with all aspects of the case, can closely supervise discovery and presides over the fairness hearing.

The court of appeals' holding that the district court abused its discretion by precluding discovery into the negotiation process is erroneous.[6] The main focus of inquiry should be the fairness of the settlement's terms. The district court permitted full and extensive discovery into the objective facts concerning the settlement's fairness. The only areas in which the lower court limited discovery were the negotiating process and the mental processes of an assistant attorney general who participated in the negotiations. There is no precedent for requiring these types of discovery, and denial of such discovery did not prejudice the objectors in any way because of the full discovery which was allowed into the objective facts surrounding the settlement.

Inquiry into a negotiator's thoughts adds nothing to the information that is helpful in evaluating the fairness of a settlement offer. For example, once the negotiating tactics are made public through discovery, objectors can always assert that a high initial demand and an ultimate lower settlement reflect weak bargaining, while a low initial demand purportedly demonstrates lack of vigor and skill. On the other hand, to require such discovery might well have a chilling impact on the willingness of litigants to enter into settlement negotiations, thus further frustrating the policy favoring settlements.

The reason advanced by the Seventh Circuit for imposing a heightened burden for establishing fairness and insisting upon detailed inquiry into the settlement negotiations was its view that the representation of consumer interests in the negotiations by state attorneys general may have been inadequate. In fact,

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[6] The proper standard for a court of appeals to apply in reviewing a district court's discovery orders is also abuse of discretion. *See, e.g., Perel* v. *Vanderford,* 547 F.2d 278 (5th Cir. 1977). The Seventh Circuit's failure to apply this standard to its ruling that the district court should have allowed more extensive discovery into the negotiation process is, therefore, further basis for the granting of this petition.

the attorneys general were clearly adequate representatives of consumers. Adequacy of representation "depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975). By state law, attorneys general must represent and protect the interests of residents under consumer protection statutes, thus assuring the absence of antagonistic interests to a federal class which includes their states' residents and which seeks recovery for the same consumers' claims under federal statutes. No question has been raised as to the qualifications of attorneys general as counsel, an inquiry treated as *"pro forma"* even with regard to private counsel. *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1471 n.93 (1976). Thus once again with regard to this issue, the court of appeals has erroneously disturbed a determination properly made by the district court.

The court of appeals' decision is in conflict with other circuits, and the court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision. This case presents an important question of federal law which has not been, but should be settled by the Court.

II. In Derogation of Modern Rule 23 and the Rulings of Other Circuits, the Court of Appeals Improperly Held that a Class Settlement May Not Bind Objecting Class Members.

A second ground upon which the court of appeals based its reversal of the district court's approval of the class settlement was that the form of the settlement required that the Magnuson-Moss claims of all eligible class members be dismissed with prejudice, irrespective of whether individual class

members were satisfied with the settlement. The court of appeals stated that:

> We do not disagree with GM's statement that class members can be bound by a settlement over their objections and that the same is true of objecting named plaintiffs. Similarly, we agree that Rule 23 was amended to eliminate the spurious class action. We do not think that it follows, however, that the trial court has the power under Rule 23 to dismiss with prejudice the Magnuson-Moss claims of those subclass members who refuse to accept the settlement package.

Appendix at pp. 70a-71a. We submit that this holding is wrong as a matter of law, and completely at odds with the purpose of Rule 23.

The main purpose of the class action device is to enable courts to bind individuals who are not before it.

> The class action is a procedural device which enables claims to be asserted by, or against, a large number of persons without formally bringing each person into court. The class action achieves economies of time, effort, and expense by the elimination of repetitious litigation and minimizes the possibility of inconsistent adjudications involving common questions, related events, or requests for similar relief by persons similarly situated. *The binding effect of class action judgments upon absent class members is crucial to achieving these goals, and the development of federal class action procedure has largely reflected efforts to bolster and extend this binding effect.*

Note, *Collateral Attack on the Binding Effect of Class Action Judgments,* 87 Harv.L.Rev. 589, 589 (1974) (emphasis added) (footnote omitted). As the Court held nearly forty years ago, class members not present as parties before a court may be bound by a judgment in a class action. *Hansberry* v. *Lee,* 311 U.S. 32, 42-43 (1940). As it has held more recently:

> [T]he present Rule provides that in Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who

> have not requested exclusion. Rule 23(c)(3). Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter, they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

American Pipe & Construction Co. v. *Utah,* 414 U.S. 538, 548-49 (1974) (footnote omitted).

This general proposition has been consistently applied by courts of appeals in the context of class settlements. The Seventh Circuit's decision is, therefore, in conflict with the decisions of other courts of appeals. Thus class members have been held to be barred by *res judicata* from prosecuting an action against defendants who were parties to a prior class action for the same claims which were settled. *Berry Petroleum Company* v. *Adams & Peck,* 518 F.2d 402 (2d Cir. 1975).

Bryan v. *Pittsburgh Plate Glass Company,* 494 F.2d 799 (3d Cir. 1974), *cert. denied* 419 U.S. 900 (1974), was a case similar to the instant case. That case was a civil rights action brought under Title VII of the 1964 Civil Rights Act which was certified as a class action under Rule 23(b)(2) and (b)(3). Appeal was taken from an order of the district court approving settlement and dismissing the complaint with prejudice. The court of appeals affirmed, stating that:

> Appellants argue that litigants should not be forced to abandon personal, as opposed to joint, rights without a judicial decision on the merits. The present Rule 23, however, makes no distinction for settlement purposes between class suits formerly called "true" class actions, where the class shares a joint right or liability, and class suits formerly denominated "hybrid" or "spurious," where rights or liabilities are several.

Id. at 803.

In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1974), *cert. denied* 419 U.S. 1034 (1974), is also similar to the instant case. This was an appeal from the granting of a Rule 60(b) motion for relief from judgment by the state of Ohio, which was a class member in this securities action. The terms of the settlement "barred forever the prosecution against the defendants of any and all settled claims by any member of the classes, except by those who opted out." *Id.* at 839. The state of Ohio did not elect to opt out. The court of appeals reversed the grant of relief from judgment.

> In 1966 class action procedures were revised under Rule 23(c)(2) with respect to actions, such as the instant one, brought under Rule 23(b)(3). Recognizing the unique availability of exclusion under 23(b)(3) actions, the revised rule requires that the best practicable notice under the circumstances be sent to the members of the class advising them of their right to opt out or to enter an appearance in the action through counsel. *The resulting judgment, whether favorable or not, will bind all members who then fail to exercise the option to be excluded.* By requiring this affirmative action by the absentee, the rule seeks to eliminate "one-way intervention," a practice common in "spurious" class suits prior to 1966.

Id. at 842-43 (emphasis added) (footnote omitted). In words equally applicable to this case, the court then stated that:

> To uphold the decision of the court below would, in our opinion, offer "a return to one-way intervention under a new guise." . . . The purpose of class actions is to avoid multiplicity of suits and upholding the decision of the court below would frustrate not only the interest in finality of judgments but also the interest in settlement of complex litigation.

Id. at 843-44. *See also* Dam, *Class Action Notice: Who Needs It?*, 1974 Sup. Ct. Rev. 97, 116-18.

The Seventh Circuit's decision in the instant case is manifestly in conflict with these decisions of other courts of appeals.

In addition, the question posed by it is a basic one to the administration of Rule 23: does the election of a class member to remain in a Rule 23(b)(3) class permit the binding of that class member to a settlement which has been found to be fair and reasonable? If class actions are ever to be settled, the answer to this question must be in the affirmative. The implications for the management and resolution of class actions posed by the Seventh Circuit's opinion are, therefore, ominous indeed. The court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

August 2, 1979

Respectfully submitted,

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